JUL 16 2002

No. 01-1127

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

BILL LOCKYER, ATTORNEY GENERAL OF CALIFORNIA,

Petitioner,

v.

LEANDRO ANDRADE,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE CALIFORNIA PUBLIC DEFENDERS ASSOCIATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

The amicus curiae will address the following question:

Whether the imposition of a life sentence with no possibility of parole for 50 years for the theft of nine videotapes violates the Eighth Amendment's prohibition against cruel and unusual punishment.

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INTEREST OF THE AMICUS CURIAE

With a membership of well over three thousand public and private defenders, the California Public Defenders Association ("CPDA") is the largest association of defense counsel in California. Its members are involved in the representation of criminal defendants, including those charged under the Three Strikes and You're Out law, throughout the state of California. The CPDA has assisted this Court with amicus briefing over the last two decades, most recently in United States v. Knights, 534 U.S. 112 (2001).[1]

STATEMENT

In 1995, respondent Leandro Andrade shoplifted nine videotapes worth a total of $153.54 from two Southern California Kmart stores. Andrade was subsequently convicted of two counts of "petty theft with a prior"pursuant to California Penal Code § 666. The jury further concluded that he had been twice previously convicted of burglary and Andrade was then sentenced by the court to two consecutive indeterminate life terms pursuant to California's Three Strikes and You're Out Law ("Three Strikes law"). He will not be eligible for parole until 2046 at which time he will be 87 years old.

California's Three Strikes law is contained in California Penal Code §§ 667; 1170.12.[2] One of the law's unique features

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[1] This brief was written entirely by counsel for amicus without assistance or contributions from any party. The parties gave written consent to the filing of this brief.

[2] The latter is the text of the ballot initiative approved by California's voters in 1994 as Proposition 184; the former is the text

(continued...)

is that its increased punishment provisions are triggered by conviction for any felony. Cal. Pen. Code §§ 667(c); 1170.12(a). If a defendant has previously been convicted of a single serious or violent felony,[3] he is to be sentenced under the law's "second strike" provision to "twice the term otherwise provided as punishment for the current felony conviction." Id. at §§ 667(e)(1);1170.12(c)(1). If a defendant has been twice convicted of a serious or violent felony, he is to be sentenced for his "third strike" to an indeterminate life sentence with a minimum term equal to the greater of: "three times the term otherwise provided as punishment for each current felony conviction"; twenty five years; or the term otherwise specified by law. Id. at §§ 667(e)(2); 1170.12(c)(2). The law further mandates that a defendant convicted of more than one subsequent crime not committed on the same occasion shall be sentenced consecutively for that conduct. Id. at §§ 667(c)(6); 1170.12(a)(6).

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[2](...continued)
of the law passed the same year by the state legislature and signed by Governor Pete Wilson. The provisions of the two statutes are essentially identical.

[3] Violent and serious felonies are defined in Cal. Pen. Code §§ 667.5 and 11[illegible].7(c), respectively. These crimes include: murder, rape, robbery, kidnapping, first degree burglary, providing controlled substances to minors, and other significant felonies.

SUMMARY OF THE ARGUMENT

While this Court has held that direct proportionality between offense and punishment is not constitutionally required, a sentencing authority violates the Eighth Amendment's prohibition against cruel and unusual punishment when it imposes "extreme sentences that are 'grossly disproportionate' to the crime." Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring) (quoting Solem v. Helm, 463 U.S. 277, 288 (1983)). In determining whether a particular sentence is grossly disproportionate, a reviewing court must evaluate: "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." Helm, 463 U.S. at 292.

The purpose of this brief is to bring to the Court's attention additional information regarding each of Mr. Andrade's three main assertions in his brief on the merits, namely: (1) that the imposition of a life sentence with no possibility of parole for fifty years upon conviction for two minor property offenses raises an obvious presumption of gross disproportionality; (2) that the punishment visited upon Mr. Andrade is not consistent with other punishments doled out by the state of California; and (3) that the punishment received by Mr. Andrade is not consistent with penalties imposed by other states on similar recidivist offenders. In particular, this brief surveys the available empirical evidence regarding the application of the Three Strikes law by prosecutors, the characteristics of those sentenced under the law and the effect, if any, that the law's enforcement has had on crime in

California.

ARGUMENT

I. BECAUSE THE THREE STRIKES LAW PRECLUDES EXAMINATION OF THE SERIOUSNESS OF THE TRIGGERING OFFENSE, IT PRODUCES GROSSLY DISPROPORTIONATE RESULTS.

A. The Law Is Written In a Way That Leads to Disproportionate Results

This Court has stated that while a state may punish a recidivist offender more seriously than it does a first time offender, Rummel v. Estelle, 445 U.S. 263, 285 (1980), the sentence imposed must be based primarily upon the defendant's "principal felony -- the felony that triggers the life sentence -- since [the defendant] already has paid the penalty for each of his prior offenses." Helm, 463 U.S. at 296 n.21. Almost by definition, California's Three Strikes law fails this test. The Three Strikes law indiscriminately imposes the same penalty -- an indeterminate life sentence -- on *all* felons regardless of their triggering offense if they have two or more prior serious or violent offenses on their criminal record.[4] As a result,

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[4] In sharp contrast, the "second strike" provision of the California statute explicitly takes the seriousness of the defendant's triggering offense into account, sentencing a "second strike" offender to a term equal to twice the presumptive term for this instant offense. Cal. Pen. Code §§ 667(e)(1); 1170.12(c)(1). Thus, the "second strike" provision, unlike the "third strike" provision, takes into account both the seriousness of the defendant's criminal history *and* the (continued...)

defendants, such as Mr. Andrade, whose Three Strikes sentences are triggered by the least serious offenses punishable as felonies under the California Penal Code, are punished as severely as those whose triggering offenses are serious or violent felonies.[5]

The fact that California's Three Strikes statute renders the seriousness of the defendant's instant offense irrelevant leads to truly remarkable, counterintuitive results. For example, had Mr. Andrade committed his crimes in the reverse order – that is, had his prior offenses been petty thefts and his instant offenses been burglaries rather than vice-versa – he would not be eligible for punishment under the Three Strikes Law. See, e.g., Franklin E. Zimring, et. al, Punishment and Democracy 10, Table 1.2 (2001). In other words, under the Three Strikes law, a defendant whose offenses become *less* serious over time is punished more severely than one whose offenses become *more* serious over time. Furthermore, had Mr. Andrade committed brutal rapes instead of burglaries as his

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[4](...continued)
seriousness of his triggering offense.

[5] Petitioner argues that other sentencing provisions mitigate the unfairness of the Three Strikes law by enhancing the sentences of those convicted of serious or violent third strikes. See Brief for Petitioner at 21-22. That some third strike offenders might receive indeterminate life sentences with no possibility of parole for seventy-five years is only partially relevant to whether an indeterminate life sentence with no possibility of parole for fifty years is cruel and unusual on these facts. Mr. Andrade is nonetheless serving a long, indeterminate sentence triggered by a minor offense, a sentence greater than other, more serious offenders receive in California and greater than Mr. Andrade would have received elsewhere.

prior offenses, *he would not even be eligible for prosecution as a felon*, as his triggering offense, petty theft, may be treated as a felony under California law only if he has been previously convicted of a property offense.[6] If his priors had been violent rather than property offenses, Mr. Andrade could have been sentenced to *at most* one year confinement, or exactly one-fiftieth the *minimum* term he must now serve..

B. The Sentence Imposed in This Case is Grossly Disproportionate

In this case, the Three Strikes law's one-size-fits-all sentencing has lead to a grossly disproportionate sentence. Leandro Andrade, who has never committed, threatened, or attempted a crime of violence, received an indeterminate life sentence for a crime that the California legislature has decided may be punished by confinement for under a year in a county jail. Id. While petitioner argues that petty theft with a prior is "classifiable as a felony" and that this "determination is no different than the legislature's determination that the theft of property exceeding a value of $400 is a felony" (Brief for Petitioner at 13), petty theft with a prior is quite different from

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[6] See Cal. Pen. Code § 666:

> Every person who, having been convicted of petty theft, grand theft, auto theft . . . burglary, carjacking, robbery, or a felony violation of Section 496 and having served a term therefor in any penal institution or having been imprisoned therein as a condition of probation for that offense, is subsequently convicted of petty theft, then the person convicted of that subsequent offense is punishable by imprisonment in the county jail not exceeding one year, or in the state prison.

any other felony in California.

The difference resides in the fact that petty theft with a prior is a "wobbler," an offense that the California Legislature has determined may be punished either as a misdemeanor or as a felony at the discretion of the prosecuting attorney and the court. See, e.g., Cal. Pen. Code § 17(b); People v. Terry, 47 Cal. App. 4th 329, 332 (1st Dist. 1996). Thus, Mr. Andrade's conduct was, *by the determination of the legislature*, less serious than that of run-of-the-mill felons, as evidenced by the fact that prosecutors were given the option of prosecuting that conduct as a crime punishable by confinement to a county jail for a term of days rather than in the state prison for a term of years.

Notwithstanding the non-violent nature of Mr. Andrade's triggering crime, and the fact that the legislature has determined that his crime was one that could be punished adequately by confinement in a county jail, there are only two punishments more serious than the indeterminate life sentence actually imposed upon respondent: life without possibility of parole and death. Even when the Mr. Andrade's prior criminal history is taken into account, the fact remains that a man who has never committed a crime against a person, never committed a crime of violence, is being punished more severely than all but a handful of California felons.

C. The Number of Non-Violent Criminals Serving Indeterminate Life Terms is Immense.

Not only is the statute written in a way that makes disproportionate results possible, and not only is the result in

this case disproportionate, but the evidence also reveals that large numbers of non-violent, non-serious offenders are being sentenced to indeterminate life terms under the law's provisions.

The state of California's own data makes this point eloquently. After eight years of the law's application, more than 7,000 men and women are serving indeterminate life sentences in California, many of them triggered by relatively minor crimes. California Department of Corrections, Data Analysis Unit, Second and Third Strikers in the Inmate Population (March 31, 2002) at http://www.cdc.state.ca.us/pdf/strike0q302.pdf. In fact, fewer than half of those serving indeterminate life terms under the law have been sentenced for a Third Strike that involved a crime of violence. Id. (finding that forty-five percent of those sentenced under the law were sentenced for a crime against persons.). According to the California Department of Corrections, 2,158 of the 7,167 Third Strikes prison inmates in California (30%) are imprisoned for non-violent property offenses including 344 for petty theft with a prior, 164 for receiving stolen property, and 217 for auto-vehicle theft. Id. More inmates are serving life terms under the Three Strikes law for simple possession of a controlled substance (650) than for murder, manslaughter, and rape *combined* (430). Id.

Mr. Andrade's case is, thus, not an isolated one. While the facts of his case make his sentence particularly egregious, his case is merely emblematic of how a law sold to the voters as a measure to remove California's most serious and violent offenders from the streets is being used to incapacitate relatively minor offenders for extremely long, indeterminate sentences.

II. AN INTERSTATE COMPARISON OF RECIDIVIST LAWS INDICATES THAT CALIFORNIA'S STATUTE IS EXTREME AND WITHOUT PEER.

This Court has held that the meaning of the Cruel and Unusual Punishment Clause of the Eighth Amendment is not fixed, but rather "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (1958). In its most recent Eighth Amendment decision the Court re-iterated its long-standing position that the legislative enactments of the several states provide the "clearest and most reliable objective evidence of contemporary values." Atkins v. Virginia, 122 S.Ct. 2242 (2002) (citing Penry v. Lynaugh, 492 US. 302, 331 (1989)). Furthermore, the Court has held that the proper time frame in which to evaluate contemporary values is by looking at "those that currently prevail." Atkins, 122 S.Ct. at 2247.

Nearly every state currently has a law on its books that could be described as a Three Strikes or recidivist law. However in most cases, these laws share little with California's Three Strikes law except for their names; both the fact that the California law is triggered by any additional felony and that a life sentence may be imposed on a defendant with no history of violence place it at the extremes of criminal punishment in this country.

The majority of states with recidivist laws on their books require that the triggering offense or at least one prior offense be violent or serious before their most serious provisions can be imposed. See, e.g., Ark. Code Ann. § 5-4-

501 (Michie 1987) (a defendant convicted of a felony involving violence who has been previously convicted of one or more serious felonies involving violence is to be sentenced to a period of not less than 40 years nor more than 80 years); Conn. Gen. Stat. § 53a-40 (2001) (a defendant who has both a current and prior violent offense is considered a persistent dangerous felony offender and shall be sentenced to life imprisonment); Ga. Code Ann. § 17-I0-7 (2001) (same criteria trigger a sentence of life without parole); Ill. Comp. Stat. 5/33B-1 (2001) (conviction of a third violent felony triggers life imprisonment); Ind. Code § 35-50-2-8.5 (2001) (a defendant with two priors subsequently convicted of a violent felony may be sentenced to life imprisonment if convicted of a third such offense); La. Rev. Stat. Ann. § 15:529.1 (West 2001) (life term imposed for a fourth felony conviction if the current felony and at least 2 of the prior felonies are crimes of violence); Mass. Gen. Laws Ann. ch. 279 § 25 (West 2001) (conviction of a fourth violent offense produces a life term); Md. Code Ann. Art. 27, § 643B (2001) (a defendant convicted of a fourth crime of violence shall receive life imprisonment); Minn. Stat. § 609.1095 (2001) (a defendant convicted of a third violent offense shall be sentenced to at least the presumptive sentence for the instant offense); Miss. Code Ann. § 99-19-83 (2001) (a third time felon shall receive life imprisonment if either the instant offense was violent or two of his prior offenses were violent); Mont. Code Ann. § 46-18-219 (2001) (life imprisonment for conviction of a second most violent offense or a third violent offense)[7]; N.J. Stat. Ann. § 2C:43-7.1 (West 2002) (a defendant whose instant offense is violent and who has twice been

[7] Compare Mont. Code Ann. § 46-18-502 (2001) (range of not less than 5 or more than 100 years imprisonment for second felony conviction without regard to seriousness of instant offense).

convicted of crimes of violence shall receive life imprisonment); N.M. Stat. Ann. § 31-18-23 (Michie 1978) (same); N.Y. Penal Law § 70.08 (McKinney 2002) (second violent offense triggers a higher sentencing range for the instant offense)[8]; N.C. Gen. Stat. § 14-7.7 (2001) (a defendant convicted of a second crime of violence shall receive an increased term on his instant offense); Ohio Rev. Code Ann. § 2929.01 (West 2002) (second violent offense triggers increased sentencing); 42 Pa. Cons. Stat. Ann. § 9714 (West 2002) (a defendant convicted of a third crime of violence shall be sentenced to at least 25 years imprisonment); Tenn. Code Ann. § 40-35-120 (2001) (conviction of a third violent offense shall result in life imprisonment); Vt. Stat. Ann. tit. 13 § 11a (2001) (a defendant convicted of a third violent offense may receive a life term); Va. Code Ann. § 19.2-297.1 (Michie 2002) (same); Wyo. Stat. Ann. § 6-10-201 (Michie 1977) (a defendant convicted of an instant violent offense with 3 prior felonies shall be sentenced to life imprisonment).

Other states require that the triggering offense be serious before permitting their most severe sentencing provisions to be imposed. See, e.g., Iowa Code Ann. § 902.8 (West 2002) (a defendant convicted of a serious felony who has twice been convicted of any felony shall be confined for a minimum of three years); Okla. Stat. Tit. 21 § 51.1 (2001) (10-years-to-life term triggered only if third felony is punishable by five years or more imprisonment); S.C. Code Ann. § 17-25-45 (Law. Co-op. 2002) (conviction of a second most serious offense shall result in life imprisonment); Wash. Rev. Code §§

[8] Compare N.Y. Penal Law § 70.10 (McKinney 2002) (third conviction for any felony results in imprisonment for a class A felony).

9.94A.570, 9.94A.030 (2002) (conviction of a third most serous offense triggers life sentence).

Another group of states has a calibrated system whereby the severity of the recidivist sentence is measured by the severity of the current offense and the number and severity of prior offenses. See, e.g., Ala. Code § 13A-5-9 (1975) (sentence calibrated to the severity of the instant offense and the number of priors); Alaska Stat. §§ 12.55.125, 12.55.145 (2001) (same); Ariz. Rev. Stat. § 13-604 (2001) (same); Colo. Rev. Stat. § 16-13-101 (2002) (same); Fla. Stat. Ann. § 775.084 (2001) (same); Haw. Rev. Stat. § 706-606.5 (2001) (calibrating penal severity to the seriousness of the instant offense); Kan. Stat. Ann. § 21-4504 (2001) (imposing a sentence multiplier based upon the number of prior convictions); Ky. Rev. Stat. § 532.080 (2001) (sentence calibrated to the number of priors and the severity of instant offense); Mich. Comp. Laws Ann. § 777.21 (West 2002) (upper limit of minimum sentence increased based on the number of priors); Me. Rev. Stat. Ann. tit. 17-A §1252 (West 2002) (increasing the class of the instant offense); Mo. Rev. Stat. § 558.016 (2002) (sentence calibrated by the severity of the instant offense); Neb. Rev. Stat. § 29-2221 (2001) (imposing a sentencing range based upon the severity of current and/or prior offenses); N.H. Rev. Stat. Ann. § 651:6 (2001) (fixing the punishment for the instant offense based on the severity of same); N.D. Cent. Code § 12.1-32-09 (2001) (calculating the defendant's sentence based upon the severity of the instant offense for an offender with two felonies punishable by at least 5 years imprisonment); S.D. Codified Laws § 22-7-7 (2002) (class of offense increased to next higher class); Tex. Penal Code Ann. § 12.42 (2001) (sentence calibrated by the severity of the instant offense and the number of prior offenses); Utah Code Ann.§ 76-3-203.5 (2001)

(conviction of a third violent offense increases the class of instant felony); Wis. Stat. § 939.62 (2001) (calibrated increase in maximum term based upon severity of same).

Finally, California finds itself among those few states that permit the imposition of a life term regardless of the seriousness of the instant offense and in the absence of a previous showing of violence. See, e.g., Del. Code Ann. tit. 11 § 4214 (2001) (discretionary life term for any third felony); Idaho Code § 19-2514 (Michie 2001) (imprisonment for 5-years to life upon third conviction for any felony); Nev. Rev. Stat. § 207.010 (2002) (third conviction of any felony invokes sentencing options ranging from 25 years to life imprisonment without parole; W. Va. Code Ann. § 61-11-18 (Michie 2002) (third conviction of crime punishable by confinement in penitentiary results in life sentence).[9]

Even among this tiny minority of states, California finds itself standing alone: of these states, only California would treat the theft of less than $200 as a felony.[10] Thus, even among

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[9] See also, R.I. Gen. Laws § 12-19-21 (2001) (any third felony conviction produces sentence of not more than 25 years);

[10] See, Del. Code tit. 11 § 840(d) (2001) (Except where the victim is 62 years or older, or an "infirm adult" or a disabled person, "theft is a class A misdemeanor unless the value of the property received, retained, or disposed of is $1,000 or greater, in which case it is a class G felony."); Idaho Code § 18-2407 (Michie 2001) (theft of $1,000.00 or less is petit theft, unless committed in one of the enumerated ways, none of which is applicable here); Id. § 18-2408 ("Petit theft is a misdemeanor . . . ."); Nev. Rev. Stat. § 205.0835(2) (2002) ("If the value of the property or services

(continued...)

these states with the nation's broadest recidivist statutes, only California would impose a life term on a defendant with Mr. Andrade's criminal history. In fact, amicus was unable to locate a state other than California where Mr. Andrade could have received a life term for his conduct.

While the states are generally free to determine the punishment merited by each crime, and while interstate variation in penal severity is both expected and appropriate, the above inter-jurisdictional analysis in this case indicates that California's punishment of non-violent offenders such as Mr. Andrade is simply not in line with contemporary understandings of decency. See Trop v. Dulles, 356 U.S. 86, 101 (1958) ("The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.").

III. THE LAW HAS NOT DEMONSTRATED A SIGNIFICANT IMPACT ON CRIME RATES

In 1998, the California Attorney General's Office issued a report entitled: "Three Strikes and You're Out" - Its Impact on the Criminal Justice System After Four Years in which it implied that a drop of nearly 27 percent in violent crime and

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[10](...continued)
involved in the theft is less than $250, the person who committed the theft is guilty of a misdemeanor . . . ."); State v. Deal, 358 S.E.2d 226, 231 (W.Va. 1987) (finding that a recidivist sentence triggered by a non-violent offense violates the state's guarantee of proportionality in sentencing.).

more than 30 percent in six major crime categories was attributable to the passage of the Three Strikes law four years earlier. Similar claims were made in editorials by California's Attorney General and Governor. See, e.g., Dan Lungren, Our Tough Law Works, USA Today, February 24, 1997, p. 10A; Pete Wilson, "Three Strikes" Law Truly Makes California Safer, Los Angeles Daily News, March 9, 1997, p. V-3.[11]

As intuitively appealing as these arguments may seem, careful analysis calls them into serious doubt. For example, in the only book-length empirical analysis of the California Three-Strikes law, the authors found that such grandiose claims of crime reduction are simply not borne out by the evidence. Zimring, et. al, at 85-105 (2000). The authors showed that while it is true that crime in California dropped after the law went into effect, crime rates in California's largest cities (for which the best month-by-month data are available) began falling more than two years *before* the Three-Strikes law went into effect and continued falling, at virtually the same rate, in the years *after* the law went into effect. Id. at 88, Figure 6.1. While such a steady drop in crime rates neither proves nor disproves a causal relationship between the law's implementation and the prevalence of crime, it certainly points out the dangers of attributing all post-Three Strikes crime reduction to the law's passage.

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[11] Such claims have continued to the present. See, Brief of Amicus Curiae California District Attorney's Association in Support of Petitioner at 24, n. 35 ("The change to a penological theory of incapacitating habitual criminals appears to have worked. California has enjoyed a 41% drop in its crime rate since it adopted the 'Three Strikes' laws in 1994, while the rest of the country experienced a decline of only 19%.").

Petitioner argues that "a large percentage of crime is committed by a relatively small number of repeat offenders; six percent of the criminal population commits sixty to seventy percent of all crime." Brief for Petitioner at 17. While it is possible that such a group exists, the available evidence demonstrates that the offending cohort singled out for "third strike" punishment is simply not such a group. For example, by examining the criminal histories of those arrested for crimes in California both before and after the Three Strikes law went into effect, Zimring, et. al determined that those eligible for "third strike" punishment were responsible for just 3.3 percent of California crime before the law went into effect and 2.7 percent of crime after the law's passage. Id. at 94-99. Based on this evidence, the authors concluded that the crime reduction attributable to the passage of the Three Strikes was, at most, on the order of one percent, rather than the double digit reductions claimed by the law's proponents. Id.

Furthermore, according to the same study, those with a criminal history that would qualify them for Three Strikes punishment are actually *less* likely to be arrested for a crime of violence than are those ineligible for punishment under the Three Strikes law. Id. at 49, Table 4.2. While those eligible for Three Strikes punishment generally have more extensive criminal histories than those not eligible for such punishment, much of that difference is attributable to the fact that Three Strikes eligible defendants are older (and therefore closer to the end of their criminal careers) than are those without strikes on their criminal records. Id. at 50, 56, Table 4.4.

Despite this evidence that the Three Strikes law is not having the promised salutary effect on crime rates, attempts to produce an official study of the law's impact have been

unsuccessful. In 1999, Governor Gray Davis vetoed Senate Bill 873 which would have authorized and funded a study into the costs and benefits of the five-year old legislation. Assuming without proof that the law was working as it had been intended, the governor vetoed the bill stating that "an additional study is unlikely to produce much, if any, useful information that is not already available." Id. at 222. Yet this conclusion is by no means borne out by the evidence just cited.

CONCLUSION

The opinion of the Ninth Circuit Court of Appeals should be affirmed.

Respectfully submitted on this fifteenth day of July, 2002,

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